No. 15932

United States Court of Appeals

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Libelant-Appellee,
v.
DEANE HILL COUNTRY CLUB, INC. and All of its Members,
Claimants-Appellants,
(13 Coin-Operated Gaming Devices and Their Coin Contents)

APPEAL from the United States District Court for the Eastern District of Tennessee, Northern Division.

Decided March 23, 1965.

(Filed March 23, 1965. Carl W. Reuss, Clerk.)

Before WEICK, Chief Judge, CECIL and O'SULLIVAN, Circuit Judges.

PER CURIAM. The Government filed a Libel of Information in the District Court to forfeit thirteen coin-operated gaming devices otherwise known as slot machines, used and operated on the premises of the Country Club without payment of the special tax imposed by the Internal Revenue Laws. The pertinent statutes involved are 26 U.S.C., §§ 4461, 4901(a), 7301 and 7302.

The Country Club filed an intervening petition in which it denied that the machines were used in violation of the Internal Revenue laws and prayed for a return of the machines as not being subject to forfeiture.

The District Judge heard the evidence and in a memorandum opinion discussing the facts and the law ordered forfeiture.

The Country Club contends that the District Court should have sustained the motion to suppress evidence obtained under the search warrant. The ground of the motion to suppress was that the search was with a search warrant upon which there was not probable cause for the issuance thereof.

The evidence disclosed that an Internal Revenue Agent had been invited to dinner at the club house by a member of the Club, and while there, walked through an open door into the room where the machines were being operated. He observed the machines in operation and that no tax stamp was displayed.

The following day the Agent contacted the District Director of Internal Revenue and learned that no return had been filed and no tax paid on the machines. He obtained a search warrant then from the United States Commissioner on his own affidavit based on personal knowledge. The search was made and the machines were seized.

It is argued that the Agent was a trespasser because he had not been specifically invited into the room where the machines were in operation. There was a sign on the entrance door to the room which read "Members Only." The door, however, was open at the time the Agent entered. There was the testimony of the club president that on many occasions persons playing the machines, who were known to be non-members, were stopped. The record does not show that anyone was ever ejected from the room.

In our opinion the search warrant was valid. The Agent who signed the affidavit for the warrant had prob-

able cause based on his own observations. The Agent, having observed the illegal operation, could have seized the machines without a warrant. *Sanders* v. *United States*, 201 F.2d 158 (C.A. 5, 1953).

But even if the search had been illegal, the Country Club was not entitled to a return of the contraband. *United States* v. *$1,058.00 in United States Currency*, 323 F.2d 211 (C.A. 3, 1963); *Interbartolo* v. *United States*, 303 F.2d 34 (C.A. 1, 1962); *United States* v. *Carey*, 272 F.2d 492 (C.A. 5, 1959); *Grogan* v. *United States*, 261 F.2d 65 (C.A. 5, 1958) *cert. denied* 359 U.S. 944; *Bourke* v. *United States*, 44 F.2d 371 (C.A. 6, 1930) *cert. denied* 282 U.S. 897.

An intent to defraud was not a necessary element to establish violation of the statutes. It was sufficient to prove that the machines were used in the gaming operation without payment of the tax. *Voglino* v. *United States*, 253 F.2d 794 (C.A. 4, 1958) *cert. denied* 357 U.S. 919.

The other questions raised do not in our opinion merit discussion.

Affirmed.

STATUTES INVOLVED

Title 26, U.S.C.,

§ 4461. *Imposition of tax*

(a) *In general.*—There shall be imposed a special tax to be paid by every person who maintains for use or permits the use of, on any place or premises occupied by him, a coin-operated amusement or gaming device at the following rates:

* * *

(2) $250 a year, in the case of a device defined in paragraph (2) of section 4462(a); and

(3) $10 or $250 a year, as the case may be, for each additional device so maintained or the use of which is so permitted. If one such device is replaced by another, such other device shall not be considered an additional device.

§ 4462. *Definition of coin-operated amusement or gaming device*

(a) *In general.*—For purposes of this subchapter, the term "coin-operated amusement or gaming device" means—

* * *

(2) any machine which is—

(A) a so-called "slot" machine which operates by means of the insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive, cash, premiums, merchandise, or tokens, . .

§ 4901. *Payment of tax*

(a) *Condition precedent to carrying on certain business.*—No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering), 4461(2) (coin-operated gaming devices), 4721 (narcotic drugs), or 4751 (marijuana) until he has paid the special tax therefor.

(b) *Computation.*—All special taxes shall be imposed as of on the first day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for 1 year, and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced, to and including the 30th day of June following.

§ 7301. *Property subject to tax*

(a) *Taxable articles.*—Any property on which, or for or in respect whereof, any tax is imposed by this title which shall be found in the possession or custody or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of such tax, or which is removed, deposited, or concealed, with intent to defraud the United States of such tax or any part thereof, may be seized, and shall be forfeited to the United States.

§ 7302. *Property used in violation of internal revenue laws*

It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws.